RECORD AND BRIEFS

No. 17-467

FILED
DEC 4 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ANDREW KISELA,

Petitioner,

v.

AMY HUGHES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

VINCENT LEE RABAGO,
VINCE RABAGO LAW OFFICE, PLC
2135 E. Grant Road
Tucson, AZ 85719
(520) 955-9038

AMIR H. ALI
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Attorneys for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether Corporal Kisela is entitled to summary judgment on qualified immunity grounds for shooting Amy Hughes when the facts, viewed in the light most favorable to Hughes, are these: At the moment Kisela shot Hughes, she was standing stationary in her yard, five to six feet away from Sharon Chadwick. The two women were conversing, and Hughes appeared calm and peaceable. A kitchen knife, pointed down to the ground, rested in her hand. The police told Hughes to drop the kitchen knife twice, but she appeared not to register the instruction. Chadwick asked the police and Hughes to "take it easy." Kisela opened fire on Hughes, shooting at her four times through a metal fence.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

I. Facts 1

II. Proceedings 3

REASONS FOR DENYING THE PETITION 5

I. This Case is a Poor Candidate for Certiorari or Summary Reversal Because the Facts Are Muddled by Various Conflicting Accounts, and the Petition Does Not Present the Facts in the Light Most Favorable to Hughes. 7

A. The Record Contains Contradictory Evidence on Virtually Every Important Fact. 7

1. Did Hughes appear agitated, or calm and peaceable? 8

2. Did Hughes threaten Chadwick? 9

3. How many times did the police instruct Hughes to drop the kitchen knife? 10

4. Did the officers reasonably believe that Hughes heard their instructions to drop the kitchen knife? 10

5. What did Chadwick say to the officers who were pointing their guns at Hughes? 11

6. When Kisela shot Hughes, how far apart were Hughes and Chadwick? 11

7. When Kisela shot Hughes, was Hughes approaching Chadwick or standing still? 12

8. Did Hughes "wield" the kitchen knife at any point? 12

9. When Kisela shot Hughes, where was the kitchen knife? 13

B. The Petition Omits Important Facts that a Rational Juror Could Find. 13

C. The Dissent from Denial of Rehearing En Banc Misstates the Facts. 14

II. Viewing the Facts in the Light Most Favorable to Hughes, Corporal Kisela is Not Entitled to Qualified Immunity. 17

A. Viewing the Facts in the Light Most Favorable to Hughes, Corporal Kisela Committed an Obvious Constitutional Violation. 17

B. Kisela Is Not Entitled to Qualified Immunity Because Both Ninth Circuit Law and the Law of Other Circuits Clearly Establish that Police Cannot Shoot a Person Merely for Being Armed if She Does Not Make Any Threatening Moves 19

C. Kisela Is Not Entitled to Qualified Immunity Because Prior Cases Had Clearly Established a Set of Factors that Govern Use of Deadly Force, and Every One of Those Factors Cuts in Favor of Hughes. 25

D. The Court of Appeals Did Not Define Clearly Established Law at Too High a Level of Generality. 26

E. No Appellate Judge Disagreed with the Conclusion that Kisela Committed a Constitutional Violation. 28

III. This Case Does Not Present the Question Whether the Police May Use Deadly Force To Prevent Third Party Harm, Nor Is There a Circuit Split on that Question. 29

A. This Case Does Not Present the Question Whether a Police Officer May Use Deadly Force To Prevent Third Party Harm. 30

B. There Is No Circuit Split as to Whether Police Officers May Use Deadly Force To Prevent Third Party Harm. 31

C. There is No Conflict Between the Decision Below and the Prior Decisions of the Ninth Circuit and this Court. 33

CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Ashcroft v. al–Kidd, 563 U.S. 731 (2011) 26
Blanford v. Sacramento County, 406 F.3d 1110 (9th Cir. 2005) 16, 33
Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007) 21
Brosseau v. Haugen, 543 U.S. 194 (2004) 18
Bryan v. MacPherson, 630 F.3d 805 (9th Cir. 2010) 25
Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994) 19
Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991) 6, 20
Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) .....*passim*
Duong v. Telford Borough, 186 F. App'x 214 (3d Cir. 2006) 6, 23
George v. Morris, 736 F.3d 829 (9th Cir. 2013) 25
Graham v. Connor, 490 U.S. 386 (1985) 18, 29, 30
Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997) 6, 19
Hope v. Pelzer, 536 U.S. 730 (2002) 27
Isayeva v. Sacramento Sheriff's Department, 872 F.3d 938 (9th Cir. 2017) 27
Larsen's Estate v. Murr, 511 F.3d 1255 (10th Cir. 2008) 31
Long v. City and County of Honolulu, 511 F.3d 901, (9th Cir. 2007) 19
Long v. Slaton, 508 F.3d 576 (11th Cir. 2007) 32
Mace v. City of Palestine, 333 F.3d 621 (5th Cir. 2003) 31
McKinney v. DeKalb Cty., 997 F.2d 1440 (11th Cir. 1993) 6, 22
Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005) 6, 24

Mullenix v. Luna, 136 S. Ct. 305 (2015) 26
Reyes v. Bridgwater, 362 Fed. Appx. 403
(5th Cir. 2010) 6, 23
Scott v. Harris, 550 U. S. 372 (2007) 33
Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994) 19
Sevier v. City of Lawrence, 60 F.3d 695
(10th Cir. 1995) 6, 22
Stanton v. Sims, 134 S. Ct. 3 (2013) 28
Tennessee v. Garner, 471 U.S. 1
(1985) 6, 18, 19, 25
Thomson v. Salt Lake County, 584 F.3d 1304
(10th Cir. 2009) 31
United States v. Meling, 47 F.3d 1546
(9th Cir. 1995) 9
Untalan v. City of Lorain, 430 F.3d 312
(6th Cir. 2005) 30, 31
Walker v. City of Orem, 451 F.3d 1139
(10th Cir. 2006) 21
White v. Pauly, 137 S. Ct. 548 (2017) 18, 26
Wilson v. Layne, 526 U.S. 603 (1999) 28

Statutes

42 U.S.C. § 1983 3

STATEMENT OF THE CASE

I. Facts

Amy Hughes and Sharon Chadwick lived in the same house, and the two women were good friends. ER 107 (Chadwick). On May 21, 2010, Ms. Hughes had been seen cutting a tree with a knife, and police were radioed to check on her welfare. ER 286 (Kisela), 321 (Kunz). No crime had been reported. ER 114 (Garcia).

Corporal Andrew Kisela arrived on the scene with Officer Alex Garcia. ER 301 (Garcia). Officer Lindsey Kunz arrived separately. ER. 302 (Garcia). The officers first saw Ms. Chadwick. ER 301–302 (Garcia). Hughes came out of her house and into the yard, walking in Chadwick's direction. ER 301–302 (Garcia). Less than a minute later, Hughes was bleeding on the ground, having been shot by Corporal Kisela. ER 286–287 (Kisela). Virtually everything that happened between the arrival of the police and the shooting of Ms. Hughes is disputed. Viewed in the light most favorable to Ms. Hughes, the facts are these:

The police observed Hughes and Chadwick having a discussion and talking back and forth. ER 322–323 (Kunz). Hughes's demeanor during the discussion was composed and content. ER 109 (Chadwick). Hughes was acting peaceably. ER 194–195 (Hughes Resp. to Requests for Admission). She did not appear angry. ER 323 (Kunz). Because Hughes was holding a kitchen knife at her side, the officers drew their guns. ER 302–303 (Garcia). Kisela drew first. ER 303 (Garcia). The officers did not observe Hughes make any threatening

moves, or threaten Chadwick in any way. ER 110–111 (Chadwick); ER 246 (Hughes); ER 325 (Kunz).

Although the police officers were in uniform, they did not identify themselves as police. ER 110 (Chadwick); ER 304 (Garcia). They instructed Hughes to drop the kitchen knife twice. ER 109 (Chadwick). Hughes appeared not to hear the two instructions. ER 323–324 (Kunz). To prevent her friend from being shot, Chadwick said, "hey, take it easy," directing the comment to both Hughes and the police. ER 109, 199 (Chadwick).

At the time Kisela shot Hughes, Hughes and Chadwick were approximately five to six feet apart, and both were stationary. ER 281 (Kisela); ER 306 (Garcia). Hughes, who was standing in her own yard, held a kitchen knife in her left hand. Her arm was resting down at her side, and the tip of the kitchen knife pointed toward the ground. ER 109–110 (Chadwick); ER 305–306 (Garcia). She did not raise the kitchen knife at any point that the police were present. ER 110 (Chadwick); ER 322, 325 (Kunz); ER 306 (Garcia).

The other two officers did not shoot. ER 118 (Garcia); ER 325 (Kunz). Officer Garcia held his fire because he "wanted to continue trying verbal command and see if that would work." ER 120 (Garcia). He was inclined to "use some lesser means" than shooting Hughes because there was time "[t]o try to talk her down." ER 120–121.

After she was shot, Hughes fell to the ground, bleeding and screaming. ER 109 (Chadwick); ER 286

(Kisela). She looked up at the officers and said, "Why'd you shoot me?" ER 308 (Garcia).

When he shot at Hughes four times, Corporal Kisela endangered not only her but also his fellow officers and Ms. Chadwick because he fired through a metal chain link fence. According to Hughes' expert, "[t]he force of the round at approximately 1000 ft a second could have fragmented and hit not only the person it was intended for but anyone within close proximity . . . ." ER 155. Chadwick herself was hit by a projectile during the shooting. ER 211 (Chadwick).

II. Proceedings

Ms. Hughes brought suit against Corporal Kisela in the United States District Court for the District of Arizona, alleging a claim under 42 U.S.C. § 1983 for excessive force under the Fourth Amendment and a state law claim for negligence. Pet. App. 70–71. The district court granted Kisela's motion to dismiss the state law negligence claim, and later granted his motion for summary judgment on the excessive force claim, finding that Kisela did not violate the Fourth Amendment and was entitled to qualified immunity. Pet. App. 71, 84–85.

Hughes appealed, and the court of appeals reversed the grant of summary judgment on the excessive force claim, finding that summary judgment was improper on the issue of excessive force because "[m]aterial questions of fact, such as the severity of the threat, the adequacy of police warnings, and the potential for less intrusive means are plainly in dispute." Pet. App. 43, 49. The court also concluded

that "the record does not support Corporal Kisela's perception of an immediate threat." Pet. App. 38. Because a rational juror could find that no immediate threat existed, and because previous Ninth Circuit cases found a Fourth Amendment violation where police used deadly force against people who did not present any immediate threat, the court held that Corporal Kisela was not entitled to summary judgment on qualified immunity grounds. Pet. App. 44–49. The court concluded that a jury "could find that [Hughes] had a constitutional right to walk down her driveway holding a knife without being shot." Pet. App. 49.

Kisela filed a petition for rehearing en banc, which the court of appeals denied. Pet. App. 2. Judge Ikuta, joined by Judges Kozinski, Tallman, Bybee, Callahan, Bea, and N.R. Smith, dissented from the denial of rehearing en banc. Pet. App. 17. The dissent argued that the panel opinion framed clearly established law at too high a level of generality. Pet. App. 17. According to the dissent, the panel should have considered whether "shooting a reportedly erratic, knife wielding woman who comes within striking distance of a third party, ignores multiple orders to drop her weapon, and cannot otherwise be timely subdued due to a physical barrier separating her from the officer" violated clearly established law. Pet. App. 23. Judge Berzon, joined by Judge Gould, filed a concurrence in the denial of rehearing en banc. Pet. App. 5. Judge Sessions, who sat by designation on the panel, agreed with the views stated in the concurrence. Pet. App. 4.

REASONS FOR DENYING THE PETITION

This fact-bound case comprises a tangled and inconsistent set of disputed recollections. The proper outcome turns on which conflicting parts of which conflicting witness accounts a factfinder ultimately decides to credit. This case is a poor candidate for certiorari or summary reversal because the record fails to answer definitively nearly all of the important factual questions that this case presents. For the same reason, it is a poor vehicle to resolve any legal question of broad significance.

The petition and the dissent from denial of rehearing oversimplify the facts of this case, relying on assumptions contradicted by other accounts contained in the record, and failing to present the facts in the light most favorable to Ms. Hughes. Contrary to the petition, a rational juror could find the following facts: (1) Hughes appeared calm and peaceable when Corporal Kisela shot her, (2) the police did not observe Hughes do anything threatening, (3) the police warned Hughes to drop her kitchen knife only twice, (4) Corporal Kisela would have known based on Hughes' demeanor that she did not register either warning, (5) Chadwick told the police to "take it easy" to prevent them from needlessly shooting Hughes, (6) Hughes was standing stationary when Corporal Kisela shot her, (7) Hughes' kitchen knife was resting in her hand and pointed down to the ground, (8) Kisela fabricated a skin-saving story—contradicted by every other witness—that Hughes raised the kitchen knife just before he shot her, (9) Officer Garcia held his fire because he wanted to deescalate the situation with

verbal instructions to Hughes, (10) Corporal Kisela recklessly exposed not only Hughes but also his fellow officers and Ms. Chadwick to danger by firing four times into a metal fence.

Taking these as the facts, as the Court must at this stage of the proceedings, this is not a complicated case from the standpoint of qualified immunity. It is well settled that a police officer may shoot a person only "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

In this case, Corporal Kisela committed an obvious constitutional violation by shooting a woman who was conversing in a peaceable manner while holding a kitchen knife in a residential yard (her own yard, as it turned out). Many cases from the Ninth Circuit and other courts of appeals stand for the obvious proposition that police cannot shoot at someone merely because she has a weapon—there must, at minimum, be some indication that she is going to use it. *See Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997); *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001); *Curnow v. Ridgecrest Police*, 952 F.2d 321 (9th Cir. 1991); *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995); *McKinney v. DeKalb Cty.*, 997 F.2d 1440 (11th Cir. 1993); *Reyes v. Bridgwater*, 362 Fed. Appx. 403 (5th Cir. 2010); *Duong v. Telford Borough*, 186 F. App'x 214 (3d Cir. 2006); *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005).

This case also does not present a circuit split, or a conflict with the prior decisions of this Court or the

Ninth Circuit. The supposed split rests on the incorrect premise that the decision below failed to consider third-party harm, but the court of appeals clearly analyzed the possibility of such harm. The court of appeals simply took the facts in the light most favorable to Hughes, as the law requires on summary judgment. On those facts, Corporal Kisela was not entitled to summary judgment because he sprayed a woman with bullets for no good reason.

I. This Case is a Poor Candidate for Certiorari or Summary Reversal Because the Facts Are Muddled by Various Conflicting Accounts, and the Petition Does Not Present the Facts in the Light Most Favorable to Hughes.

A. The Record Contains Contradictory Evidence on Virtually Every Important Fact.

When the record is considered in the light most favorable to Ms. Hughes, the factual predicates of the petitioner's questions presented disappear. Police did not observe Hughes "acting erratically," but displaying a calm and content demeanor. Pet. i. Although the officers did observe Hughes "walking . . . toward" Chadwick, *id.*, Hughes had stopped and was standing still when Kisela opened fire. Hughes did not simply "move[ ] with" Chadwick, *id.*—she moved away from Chadwick at other points. Hughes did not "ignore[ ] commands to drop the knife, *id.*, but did not hear or did not register them, as Kisela would have realized. Kisela did not have a "well-founded belief that potentially lethal force was necessary to protect

[Chadwick] from an attack that could have serious or deadly consequences," *id.*, because the facts did not establish any immediate threat. In fact, as we demonstrate below, not only the factual assertions in the questions presented, but virtually all of the key factual premises relied upon by the petitioner and the dissent do not construe the record in the light most favorable to Hughes.

1. Did Hughes appear agitated, or calm and peaceable?

In an effort to paint Hughes as unhinged during her interaction with the police, petitioner cites testimony from a witness who observed Hughes earlier in the day, but was not present for Hughes' and Chadwick's encounter with the police. Pet. 3. The characterizations of this witness do not shed light on Ms. Hughes' demeanor at the relevant time—when police observed her. At the time the officers arrived on the scene, they were responding to a radioed in call to check on the welfare of a woman who had been seen cutting tree branches with a knife. ER 286 (Kisela), 321 (Kunz).

Viewed in the light most favorable to the respondent, the police observed a Ms. Hughes who appeared placid and harmless. Chadwick described Hughes as "composed and content" throughout their discussion outside the house. Pet. App. 11; ER 109 (Chadwick). Hughes denied that she was doing anything other than "acting peaceably" during the conversation. ER 194–195. It appeared to Officer Kunz that Hughes was "talking back and forth with [Chadwick]," and "[i]t was kind of like she was having

a discussion with [Chadwick]." ER 322, 323 (Kunz). During the discussion that the two women were having, Hughes "wasn't shouting" and "it didn't seem like she was angry." ER 323 (Kunz); Pet. App. 11. Thus, as the panel concluded, "the facts seen in the light most favorable to Hughes make clear that she did *not* act erratically once officers arrived." Pet. App. 14.

Petitioner misunderstands these characterizations as reflecting only Chadwick's "subjective" lack of fear, based on her friendship with Hughes. Pet. 20. In fact, as the panel stated, Chadwick's statements are descriptions of "Ms. Hughes's demeanor." Pet. App. 34. Fact witnesses are fully competent to testify to the demeanor of a person they observed. *See United States v. Meling*, 47 F.3d 1546, 1556 (9th Cir. 1995). A rational juror might credit Kisela's descriptions of Hughes as agitated. A rational juror might also conclude that Kisela described Hughes as agitated because he shot her and needed to justify it.

2. Did Hughes threaten Chadwick?

The petitioner seeks to depict Ms. Hughes as threatening Chadwick during the interaction witnessed by the officers. Pet. 2. Neither Officer Kunz nor Officer Garcia saw Hughes making threats to either the officers or to Chadwick. ER 324 (Kunz); ER 306 (Garcia). Officer Kunz did not observe Hughes making "any quick movements," and characterized the interaction between Hughes and Chadwick as simply "a discussion." ER 323 (Kunz). Viewing the facts in the light most favorable to Hughes, she did not threaten Chadwick or anyone else. During the incident, Chadwick "was never in fear, and did not feel that Ms.

Hughes was a threat." Pet. App. 35; ER 110–111 (Chadwick). Hughes stated that she was "no threat to nobody." ER 246 (Hughes).

3. How many times did the police instruct Hughes to drop the kitchen knife?

Chadwick, Kisela, Garcia, and Kunz offer differing accounts of how many times the officers told Hughes to drop the kitchen knife. ER 109 (Chadwick); ER 281, 283 (Kisela); ER 304 (Garcia); ER 322 (Kunz). The favorable account for Hughes, and therefore the governing account for purposes of summary judgment, is Chadwick's. Chadwick heard only two warnings "in quick succession." Pet. App. 35, 60; ER 109 (Chadwick).

4. Did the officers reasonably believe that Hughes heard their instructions to drop the kitchen knife?

The petitioner states several times that Hughes "ignored" instructions from police to drop the kitchen knife. Pet. i, 4, 5, 18. This characterization suggests that she heard the instructions and willfully ignored them, but it does not construe the facts in the light most favorable to Hughes. A rational juror could draw the more favorable inference that Hughes simply did not hear the instructions, and that reasonable officers would have perceived that she did not hear them. *See* Pet. App. 49. Indeed, Officer Kunz stated, "it seemed as though she didn't even know we were there" and "[i]t was like she didn't hear us almost." ER 323–324 (Kunz). Similarly, Officer Garcia stated that Hughes acted "almost as if we weren't there." ER 304 (Garcia).

Garcia tried to get Hughes' attention by shaking the fence. ER 304 (Garcia). Though clad in uniforms, the officers did not identify themselves as police officers. Pet. App. 15; ER 304 (Garcia), ER 330 (Kunz). As the panel stated, "[w]hether police should have perceived" that Hughes did not understand the two instructions "is a question for the jury." Pet. App. 41.

5. What did Chadwick say to the officers who were pointing their guns at Hughes?

The petition creates a false impression that Chadwick did nothing to warn the police officers that shooting Hughes was unnecessary. Pet. 5–6 ("Chadwick was aware of the officers with their drawn guns. But she did not express the view that she later asserted: that she did not feel threatened by Hughes."). In fact, Chadwick did not have time to say much because Kisela shot Hughes less than a minute from when she came into view. Pet. App. 35; ER 286–287 (Kisela). Yet even in that narrow sliver of time, while the police pointed their guns at Hughes, Chadwick said "hey, take it easy." ER 109 (Chadwick). She directed the comment to both the police and Ms. Hughes. ER 199 (Chadwick). Chadwick was about to add, "everything is all right," but she was unable to do so because Kisela opened fire. ER 109 (Chadwick).

6. When Kisela shot Hughes, how far apart were Hughes and Chadwick?

Witnesses presented differing recollections of the distance separating Hughes and Chadwick. ER 281 (Kisela), ER 305 (Garcia), ER 330 (Kunz), ER 207 (Chadwick). The most favorable account in this regard

is that the two stood about five to six feet apart. ER 281 (Kisela).

7. When Kisela shot Hughes, was Hughes approaching Chadwick or standing still?

Although Hughes had walked toward Chadwick, there are differing accounts of whether Hughes was approaching Chadwick at the moment when Kisela fired, or standing stationary. Kisela claims Hughes was "[w]alking straight towards [Chadwick]" and "[c]oming right at her" when he fired. ER 282, 284 (Kisela). Garcia, however, stated that Hughes was standing stationary, having "stopped there in front of the woman." ER 306 (Garcia). In a summary judgment posture, the Court must assume the truth of Officer Garcia's account because it is more favorable to Ms. Hughes.

The petition twice states that Hughes "moved with" Chadwick, conjuring up an image of Hughes following Chadwick around the yard. Pet. i, 18. In fact, during the brief period that officers observed the two, they also observed Hughes moving *away* from Chadwick. Pet. App. 11; ER 281 (Kisela), ER 330 (Kunz).

8. Did Hughes "wield" the kitchen knife at any point?

The petitioner characterizes Ms. Hughes as "wielding" her kitchen knife during the encounter. Pet. 1–2. This is an incorrect characterization of Hughes' actions because the word "wield" incorrectly suggests that Hughes "had [the kitchen knife] in position for use as a weapon." Pet. App. 15, n.3. On the facts most

favorable to Hughes, she was merely "carrying a kitchen knife." *Id.*

9. When Kisela shot Hughes, where was the kitchen knife?

According to petitioner, "Kisela stated that he saw Hughes raise the knife." Pet. 5. Kisela indeed made that claim, ER 281–282, but everyone else present contradicted it. According to Chadwick, the kitchen knife was "in [Hughes'] left hand down at her side." ER 109 (Chadwick). *See also* ER 110 (Chadwick) ("At no time before Amy was shot that day did Amy ever even raise the knife which was in her left hand."); *id.* ("When the officer shot Amy she was just holding the knife in her left hand with her arm down by her side, and the knife blade was pointed to the rear of her body."); ER 209 (Chadwick) (Hughes was holding the kitchen knife with the tip pointed down). According to Officer Kunz, Hughes "was just holding it down next to her side in her left hand . . ." ER 322 (Kunz). Kunz "didn't see her arm raise." ER 325 (Kunz). Officer Garcia likewise stated that Hughes did not raise the kitchen knife. Pet. 19; ER 306 (Garcia). In light of these accounts, a rational juror could draw the inference that Kisela lied about his perception that Hughes raised the kitchen knife in order to save his own skin.

B. The Petition Omits Important Facts that a Rational Juror Could Find.

In addition to resolving disputed facts in Kisela's favor, the petition and dissent omit facts favorable to Hughes. First, it is undisputed that the other officers

chose not to fire, although they observed the same situation. ER 118 (Garcia); ER 325 (Kunz). Officer Garcia candidly stated that he "wanted to continue trying verbal command and see if that would work." ER 120 (Garcia). In Officer Garcia's judgment, there was time "[t]o try to talk her down" and to "use some lesser means." ER 120–121 (Garcia). A rational juror could find that the judgment of the other officers in holding their fire is relevant to whether Corporal Kisela's use of force was reasonable.

A rational juror could also conclude that Kisela endangered third parties by shooting at Hughes. "The force of the round at approximately 1000 [feet] a second could have fragmented and hit not only the person it was intended for but anyone within close proximity . . ." ER 155. Chadwick herself was hit by a projectile, and the officers were standing close to each other when Kisela fired. ER 211 (Chadwick); ER 307 (Garcia).

Given the conflicting evidence on nearly all the material facts, this case does not lend itself to summary disposition. This case is also too fact-bound to provide a vehicle for resolving any recurrent legal questions through a grant of certiorari.

C. The Dissent from Denial of Rehearing En Banc Misstates the Facts.

The dissent states, "[t]he relevant facts necessary to resolve the qualified immunity analysis are not in dispute," Pet. App. 18, but goes on to characterize disputed facts in a manner unfavorable to Ms. Hughes and to ignore facts favorable to her. The dissent's legal

analysis flows from its incorrect presentation of the facts, and therefore loses its force when the facts are construed in the manner most favorable to Hughes.

Contrary to the dissent's assertion that Hughes "failed to comply" with two instructions to drop the knife, Pet. App. 19, a juror could conclude that a reasonable officer would have realized that Hughes did not hear or did not process the instructions. *See supra* § I.A.4. The dissent claims that Ms. Hughes "continued to approach Chadwick" at the moment Corporal Kisela fired, Pet. App. 19, but Officer Garcia stated that Ms. Hughes "stopped there in front of the woman." ER 306 (Garcia). The dissent ignores the fact that Ms. Chadwick asked the officers to "take it easy," ER 109, and the account that Ms. Hughes appeared composed and content. ER 109 (Chadwick).

The dissent again misstates the record and resolves disputed facts when it suggests that the "alleged constitutional violation" the panel should have considered in the qualified immunity analysis was "shooting a reportedly erratic, knife-wielding woman who comes within striking distance of the third-party, ignores multiple orders to drop her weapon, and cannot otherwise be timely subdued due to a physical barrier separating her from the officer." Pet. App. 23. Viewing the facts in the light most favorable to Hughes, she was not "wielding" anything, but was simply holding a kitchen knife as she relaxed her arm at her side, had not heard or processed two (not "multiple") instructions to drop the kitchen knife, and did not appear "erratic." *See supra* § I.A. Although the earlier third-hand account on the officers' radio

might have described Ms. Hughes as "erratic," she appeared calm when they arrived on the scene. ER 109 (Chadwick).

These factual characterizations undermine the dissent's legal analysis. The dissent distinguishes *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), on the ground that the instant case involves "[s]hooting an armed, unresponsive, and reportedly erratic woman as she approaches a third party," Pet. App. 26, but fails to acknowledge Officer Garcia's account that Ms. Hughes had stopped and was not approaching anyone when Corporal Kisela shot her. ER 306 (Garcia). The characterization of Ms. Hughes as "reportedly erratic," Pet. App. 26, also ignores the accounts that suggest she would have appeared calm and peaceable to officers on the scene, undercutting third-hand reports of earlier erratic behavior.

Similarly, the dissent's analysis of *Blanford v. Sacramento County*, 406 F.3d 1110 (9th Cir. 2005), *cited in* Pet. App. 28, a shooting case in which the Ninth Circuit did not find a constitutional violation, depends on dramatizing the facts of this case and sanitizing the facts of *Blanford*. Here again, the dissent states that Ms. Hughes "refused to drop her weapon," Pet. App. 28, even though a reasonable juror could find that the officers should have known that Hughes did not hear or process the instructions. The dissent states that Hughes was "attempting to put herself in a situation where she could have caused harm," Pet. App. 28, ignoring Officer Garcia's account that Hughes had stopped approaching Chadwick and was standing still.

The sword-wielder in *Blanford* is so dissimilar from Ms. Hughes as to render the case totally irrelevant. In *Blanford*, officers responded to reports of a man carrying a sword through a residential neighborhood while clad in a ski mask, licking the sword, and walking down the middle of a street. 272 F.3d at 1112. They arrived to find a man brandishing a 2-1/2 foot sword and wearing a ski mask pulled up from his face. *Id.* 1112. They repeatedly told him to drop the sword, identified themselves as police, and said that they would shoot. *Id.* 1112–13. But he kept going. *Id.* He raised the sword to the air and emitted a loud growl. *Id.* at 1113. The man saw the deputies and realized they "might be there for him." *Id.* Then he tried to enter a home through the back entrance while wielding the sword. *Id.* The officers opened fired because they reasonably feared that if he got into the house, he could harm anyone inside it with the sword. *Id.* at 1113.

II. Viewing the Facts in the Light Most Favorable to Hughes, Corporal Kisela is Not Entitled to Qualified Immunity.

A. Viewing the Facts in the Light Most Favorable to Hughes, Corporal Kisela Committed an Obvious Constitutional Violation.

If the facts are viewed in the light most favorable to Hughes, Kisela committed an obvious constitutional violation because he lacked any justification for the use of deadly force. Hughes displayed a calm demeanor and was speaking with her friend in their shared yard. *See supra* § I.A.1. Hughes had walked up

to Chadwick, had stopped five to six feet from her, and was standing still. *See supra* § I.A.6. As the two women conversed, Hughes rested her arm at her side, holding a kitchen knife that pointed down toward the ground. *See supra* § I.A.9. The officers gave two instructions to drop the knife, but Hughes did not seem to have heard either one. *See supra* § I.A.3. After police drew their weapons, Chadwick told Kisela and the others present to "take it easy." *See supra* § I.A.5. But rather than taking it easy, Kisela shot Hughes four times through a chain-link fence, causing her serious injury and creating a needless risk of injuring Chadwick, Garcia, and Kunz with flying shrapnel. *See supra* § I.A.5.

Kisela disputes all of these facts, of course, but that only serves to illustrate that the complicated part of this case is the facts—the conflicting accounts make the facts far from obvious, which is why a jury should sort them out. On summary judgment, however, when the complicated and conflicting narratives of the shooting must be stripped down to the account most favorable to respondent, this case becomes obvious as a legal matter. There was no reason for Kisela to shoot Ms. Hughes.

Although the legal standards that this Court announced in *Graham v. Connor*, 490 U.S. 386 (1985), and *Tennessee v. Garner*, 471 U.S. 1 (1985), are not particularized enough to defeat qualified immunity in non-obvious cases, they do clearly establish law sufficient to dispose of obvious cases like this one. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("Of course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant

case law."); *see also White v. Pauly*, 137 S. Ct. 548, 552 (2017) ("*Garner* and *Graham* do not by themselves create clearly established law outside 'an obvious case.'" (citing *Brosseau*, 543 U.S. at 199)).

B. Kisela Is Not Entitled to Qualified Immunity Because Both Ninth Circuit Law and the Law of Other Circuits Clearly Establish that Police Cannot Shoot a Person Merely for Being Armed if She Does Not Make Any Threatening Moves.

Ninth Circuit decisions that predate the events at issue in this case clearly establish that police officers cannot shoot a person—such as a woman conversing in her yard and holding a kitchen knife—if she does not pose an immediate risk of harm to an officer or third party, even if the person is holding a weapon. These cases reflect the Ninth Circuit's refinement of the basic principle that "[a]n officer's use of deadly force is reasonable only if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (quoting *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)); *Chew v. Gates*, 27 F.3d 1432, 1452 (9th Cir. 1994) (same); *Long v. City and County of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007) (same).

The Ninth Circuit has repeatedly applied the rule that police cannot shoot a person merely for being armed—the person must *do something* such as make a threat or point the weapon at someone. *Harris v. Roderick*, 126 F.3d 1189, 1193–94 (9th Cir. 1997), involved the shooting of Kevin Harris at Ruby Ridge.

On the previous day, Harris had been involved in a firefight with other FBI agents, one of whom died, possibly from a bullet fired by Harris. *Id.* at 1193. The next day, an FBI agent shot Harris, who was armed with a gun and running into a cabin. *Id.* at 1194. Harris did not make any threatening movement with the gun, and the case clearly establishes the proposition that "[l]aw enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed." *Id.* at 1204.

Similarly, in *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), a suspect acted erratically outside his home and "brandish[ed] a hatchet at a police officer." *Id.* at 1276. After discarding the hatchet, the suspect approached another officer while carrying an unloaded crossbow, which he dropped when ordered to do so. *Id.* at 1277. But the suspect continued to hold what may have been a can or bottle of lighter fluid as he approached the officer. *Id.* The officer shot the suspect with a bean-bag round. *Id.* at 1277–78. The court found that the officer committed a constitutional violation and was not entitled to qualified immunity. *Id.* at 1285–86.

Ninth Circuit law clearly establishes that police who shoot a suspect holding a *semi-automatic rifle* are not entitled to qualified immunity if there are conflicting accounts of whether the suspect raised the weapon or threatened anyone with it. In *Curnow v. Ridgecrest Police*, 952 F.2d 321, 323 (9th Cir. 1991), Officer A attempted to break down the door to the home of a suspect who had a semiautomatic rifle

within arm's reach, while Officer B aimed his gun at the suspect through a window. Ultimately, Officer B shot the suspect through the window. *Id.* Witnesses in *Curnow* disputed whether the suspect raised the rifle when Officer A tried to knock down the door or merely grabbed the rifle by the muzzle. *Id.* Viewing the facts in the light most favorable to the shooting victim, the court of appeals affirmed the denial of summary judgment to Officer B: There was no immediate danger when Officer B shot the suspect because the suspect had merely taken the semiautomatic rifle by the muzzle without aiming it at anyone. *Id.* at 325.

Surely the rule that police cannot shoot a suspect merely for holding a firearm also applies to a kitchen knife, which is generally less dangerous. *See Walker v. City of Orem*, 451 F.3d 1139, 1160 (10th Cir. 2006) ("[W]here an officer had reason to believe that a suspect was only holding a knife, not a gun, and the suspect was not charging the officer and had made no slicing or stabbing motions toward him . . . it was unreasonable for the officer to use deadly force against the suspect."); *Bouggess v. Mattingly*, 482 F.3d 886, 896 (6th Cir. 2007) ("[E]ven when a suspect has a weapon, but the officer has no reasonable belief that the suspect poses a danger of serious physical harm to him or others, deadly force is not justified . . . In other words, mere possession of a weapon is not enough to satisfy [the officer's] burden at [the summary judgment] stage.").

In addition to the Ninth Circuit cases discussed above, federal courts of appeals repeatedly held in cases decided before Corporal Kisela shot Ms. Hughes

that an officer does not enjoy qualified immunity when she shoots a person who has a knife but is not threatening anyone with it. In these cases, as in the current case, one or more officers claim that the person they shot raised a knife or did something threatening with it, but other witnesses state that the shooting victim merely held the knife. The federal courts of appeals hold that summary judgment for the shooter is not warranted because the facts viewed in the light most favorable to the shooting victim fail to demonstrate a threat.

In *Sevier v. City of Lawrence*, 60 F.3d 695, 698 (10th Cir. 1995), police responding to a 911 call found a man (Sevier) sitting in his bedroom holding a knife. Sevier later emerged from the bedroom and stood in the doorway with the knife in his right hand. *Id.* Two officers repeatedly ordered Sevier to drop the knife. *Id.* When Sevier did not, they shot him. *Id.* The officers testified that Sevier had turned and lunged at one of them with the knife in a raised and striking position, but other witnesses stated that Sevier was simply standing there with the knife at his side. *Id.* The court of appeals found that it lacked jurisdiction to consider the officers' appeal from the district court's ruling that summary judgment was inappropriate because there were genuine disputes of fact. *Id.* at 700.

In *McKinney v. DeKalb Cty.*, 997 F.2d 1440, 1442 (11th Cir. 1993), police responding to a 911 call found McKinney in his closet, holding a butcher knife in one hand and a twelve-inch stick in the other. McKinney made a motion with the stick in his hand and began to rise from his seated position. *Id.* Officer Nelsen fired

at McKinney. *Id.* The court of appeals upheld the district court's denial of summary judgment to Officer Nelsen on qualified immunity grounds. *Id.* at 1443. Viewing the facts in the light most favorable to McKinney, the court assumed that he had put down the knife and was merely shifting position, not threatening anyone's safety, when Officer Nelsen shot him. *Id.*

In Reyes v. Bridgwater, 362 Fed. Appx. 403, 404–05 (5th Cir. 2010), police officers confronted Ceballos holding a kitchen knife in an entryway to an apartment. Officers ordered Ceballos to drop the knife multiple times. *Id.* at 405. Ceballos refused and threw down his cigarette. *Id.* Officer Bridgwater then shot Cellabos. *Id.* Officers testified that Cellabos stepped forward and raised the knife, but another witness testified that Cellabos neither stepped forward nor raised the knife. *Id.* The court of appeals reversed the grant of summary judgment in favor of Officer Bridgwater on qualified immunity grounds. *Id.* at 409. Viewing the facts in the light most favorable to the plaintiff, the court assumed that Cellabos held the knife and threw down his cigarette, but did not raise the knife or step forward. *Id.* at 407–08.

In *Duong v. Telford Borough*, 186 F. App'x 214, 215 (3d Cir. 2006), a police officer entered Duong's home in response to a call that three suspicious men had entered the home. When Officer Fox entered, he saw Duong on his back with a man on top of him. *Id.* As Officer Fox called for backup, Duong, who was holding a knife, chased the other men to the back of the house. *Id.* Officer Fox, who was not aware that Duong was

the homeowner, then shot Duong. *Id.* Officer Fox testified that he identified himself as police and told Duong to drop the knife, but Duong testified that he did not hear Officer Fox say anything before he was shot. *Id.* The parties also disputed Duong's position relative to Officer Fox and his movements before he was shot. *Id.* Officer Fox testified that Duong was walking towards him and lowered his body as if he was about to leap, but Duong testified that Officer Fox shot him as soon as he sat down with the knife in his outstretched right arm, pointed away from Officer Fox. *Id.* The court of appeals upheld the district court's denial of Officer Fox's motion for summary judgment. *Id.* at 219. The court of appeals found that a reasonable jury, viewing the facts in the light most favorable to the plaintiff, could conclude that Duong was sitting down and pointing the knife away from the officer at the time he was shot, and had not received any warnings to drop the knife. *Id.* at 217.

In *Mercado v. City of Orlando*, 407 F.3d 1152, 1154 (11th Cir. 2005), police officers found a man crying on the kitchen floor and holding a knife pointed at his chest. They ordered him to drop the knife, and he refused, but he did not make a threatening move. *Id.* A police officer used a device to launch a polyurethane baton at the plaintiff's head, causing brain injury. *Id.* at 1154–55. The officer argued that he was entitled to summary judgment because the man had a knife and "suicidal subjects sometimes make erratic moves that can jeopardize the safety of the officers on the scene." *Id.* at 1157. The court disagreed because the knife was not pointed at a police officer or third party. *Id.* at 1160.

C. Kisela Is Not Entitled to Qualified Immunity Because Prior Cases Had Clearly Established a Set of Factors that Govern Use of Deadly Force, and Every One of Those Factors Cuts in Favor of Hughes.

As the panel stated, Ninth Circuit decisions interpreting this Court's jurisprudence clearly establish a particularized set of factors that govern police shooting cases. Pet. App. 52. These factors are far more detailed and specific than a bare standard of fault—such as the requirement that police use only "reasonable" force. The specific factors put real meat on the bones. They are: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officer or others, (3) whether she is actively resisting arrest or attempting to evade arrest by flight, (4) the availability of less intrusive force, and (5) whether proper warnings were given. Pet App. 37–38 (citing *Garner*, 471 U.S. at 8–9; *George v. Morris*, 736 F.3d 829, 837 (9th Cir. 2013); *Bryan v. MacPherson*, 630 F.3d 805, 826 (9th Cir. 2010); *Deorle* 272 F.3d at 1283–85 (9th Cir. 2001)).

Not only does the law clearly establish a detailed set of factors to be considered, but *every one* of those factors cuts in favor of Ms. Hughes. The panel carefully applied each factor to the facts, viewed in the light most favorable to Ms. Hughes.

Under the first factor (severity of the crime at issue), the panel found that no crime had been reported. Pet. App. 40. Under the second factor (immediate threat), Hughes posed no immediate

threat under the facts viewed in the light most favorable to her. Pet. App. 38–39. Under the third factor (attempt to flee or resist arrest), Hughes did not resist because officers made no attempt at arrest. Moreover, she did not seem to hear the officers' warnings or understand the events unfolding around her. Pet. App. 40–41. Under the fourth factor (mental illness), Corporal Kisela had reason to suspect mental illness based on the initial "check welfare" report, which conveyed that Hughes had earlier tried to cut a tree with a knife. Pet. App. 41. Under the fifth factor (availability of less intrusive means), an expert witness for Hughes concluded that Corporal Kisela had a Taser and should not have used his gun. Pet. App. 42. Indeed, the expert concluded that "shooting through the fence was . . . dangerous." Pet. App. 42. One might add to the analysis of less intrusive means the fact that Officer Garcia was inclined to "use some lesser means" than shooting Hughes because there was time "[t]o try to talk her down." ER 120–121.

D. The Court of Appeals Did Not Define Clearly Established Law at Too High a Level of Generality.

Contrary to the argument of petitioner and the dissent, the court of appeals did not define clearly established law at too high a level of generality. As demonstrated above, the panel's decision was dictated by precedent from both the Ninth Circuit and other courts of appeals, which established that holding a weapon but not threatening people with it does not license the police to open fire. *See supra* § II.B.

When the facts in this case are properly viewed in the light most favorable to Hughes, it becomes difficult to identify what more law petitioner and the dissent deem necessary to overcome qualified immunity. Perhaps they would require a Ninth Circuit case with very similar facts, but that is the very thing that this Court repeatedly has stated is *not* necessary. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011))); *White*, 137 S. Ct. at 551 (per curiam) (same); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (stating that a "fundamentally similar" or "materially similar" previous case is not required).

As Judge Berzon wrote in her concurrence in the denial of rehearing en banc, "the panel opinion is a routine application of qualified immunity principles to a set of facts that, under the applicable precedents, any reasonable officer should have realized did not justify the use of deadly force." Pet. App. 17. Indeed, the same panel of judges that reversed the grant of qualified immunity in this case reversed a denial of qualified immunity in *Isayeva v. Sacramento Sheriff's Department*, 872 F.3d 938, 942 (9th Cir. 2017), a case argued before the panel on the same day as this case.[1] Like this case, *Isayeva* also involved police officers who shot a mentally ill individual. *Id.* at 942, 944. Far from

---

[1] Oral Argument, *Isayeva v. Sacramento* Sheriff's Department, 872 F.3d 938 (No. 15-17065), *available at* https://www.ca9.uscourts.gov/media/view.php?pk_id=0000016282.

campaigning to upend qualified immunity law by relying on overly broad legal principles, the panel was simply applying law to fact when it decided both this case and *Isayeva*.

E. No Appellate Judge Disagreed with the Conclusion that Kisela Committed a Constitutional Violation.

Petitioner makes much of the fact that seven judges dissented from the denial of rehearing en banc, suggesting if "judges cannot agree on the law," then the law must not be clearly established. Pet. 30. In fact, none of the court of appeals judges expressed doubt that a constitutional violation occurred.

Judge Sessions' opinion for the Ninth Circuit panel, joined by Judges Berzon and Gould, concluded, viewing the facts in the light most favorable to Hughes, that Kisela violated the Constitution when he shot Hughes and that he was not entitled to qualified immunity. Pet. App. 49. Judge Berzon's concurrence in the denial of rehearing en banc reached the same conclusions. Pet. App. 17.

Judge Ikuta's dissent from the denial of rehearing en banc argued that Kisela is entitled to qualified immunity. Pet. App. 19–22. Judge Ikuta did not address the panel's holding on whether a constitutional violation occurred. Pet. App. 19–22. No appellate judge has ever suggested that Kisela did anything other than violate the Fourth Amendment when he shot Ms. Hughes.

Petitioner appears to be conflating lack of unanimity on two separate issues—(1) whether a

constitutional violation occurred, and (2) whether a defendant is entitled to qualified immunity despite the constitutional violation. While petitioner cites authority suggesting that disagreement on the first question may suggest a lack of clearly established law, there is no authority for the proposition that a defendant is entitled to qualified immunity whenever one or more dissenting judges believe qualified immunity should apply. See Pet. 29 (citing *Wilson v. Layne*, 526 U.S. 603, 618 (1999), and *Stanton v. Sims*, 134 S. Ct. 3, 7 (2013)).

III. This Case Does Not Present the Question Whether the Police May Use Deadly Force To Prevent Third Party Harm, Nor Is There a Circuit Split on that Question.

Laboring to manufacture a circuit split, Kisela incorrectly claims that the court of appeals decision "fail[s] to [c]onsider [p]otential [t]hird-[p]arty [h]arm," and thereby creates a circuit split over whether a risk of serious third-party harm can justify the use of deadly force. Pet. 12. Both parts of this assertion are incorrect. First, in this case, the court of appeals considered third-party harm, hewing to the settled and obvious principle of law that the police can use deadly force in the face of a real threat of harm to a third party. Pet. App. 58–59. Second, there is no circuit split on whether police may use deadly force to prevent such harm.

A. This Case Does Not Present the Question Whether a Police Officer May Use Deadly Force To Prevent Third Party Harm.

This case does not present the question whether police officers may use deadly force to prevent serious injury to a third-party—everyone, the panel included, agrees on the unremarkable proposition that police may do so. In evaluating the reasonableness of petitioner's use of lethal force, the court of appeals looked to the factors this Court set out to guide this inquiry in *Graham v. Connor*, 490 U.S. 386, 396 (1989). Pet. App. 57. Under the second factor of the *Graham* inquiry, the Ninth Circuit considered whether Hughes posed an immediate threat to "the safety of the officer *or others*." Pet. App. 57 (emphasis added). In applying this standard to the facts of the case, the court considered Officer Kisela's stated concern for Chadwick's safety, but found that "a simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such concern." Pet. App. 58 (quoting *Deorle* 272 F.3d at 1281 (9th Cir. 2001)). Because the facts of this case, viewed in the light most favorable to Hughes, did not present such objective factors, Corporal Kisela was not entitled to summary judgment. Pet. App. 59.

Kisela acknowledges, as he must, that the reasonableness of an officer's use of deadly force is judged on the "facts and circumstances of each particular case." Pet. 13 (quoting *Graham*, 490 U.S. at 396). Based on the particular facts of this case, viewed in the light most favorable to Hughes, the court of

appeals reached a fact-bound holding that a reasonable jury could have found that Hughes did not pose a serious risk to third parties.

B. There Is No Circuit Split as to Whether Police Officers May Use Deadly Force To Prevent Third Party Harm.

The court of appeals decision does not conflict with the decisions of any other circuit. On the contrary, the cases from other circuits that Kisela puts forth could not be more different than this case—they involve a genuine risk of third-party harm.

Untalan v. City of Lorain, 430 F.3d 312 (6th Cir. 2005), *cited in* Pet. 17, does not bear any resemblance to this case. In *Untalan*, an officer used lethal force against a suspect who was wrestling for control of a butcher knife after lunging at and stabbing an officer with the knife. *Id.* at 313–14. There is no comparison between, on the one hand, wrestling with a police officer for a butcher knife and, on the other, standing in a yard while holding a kitchen knife at one's side and engaging in conversation.

Similarly, in *Larsen's Estate v. Murr*, 511 F.3d 1255 (10th Cir. 2008), *cited in* Pet. App. 16, officers used deadly force against a man who raised a knife above his shoulder with the blade pointed outwards. *Id.* at 1258. When officers warned him that they would shoot if he did not drop the knife, he advanced toward the officers. *Id.*

Mace v. City of Palestine, 333 F.3d 621 (5th Cir. 2003), *cited in* Pet. 17, fits the pattern of *Untalan* and *Larsen's Estate*—police shot someone who did not

merely hold a weapon, but wielded it in a threatening manner. In *Mace*, police officers arrived to the scene to find a man with bloody hands smashing windows and brandishing a sword. *Id.* at 623. The man raised the sword toward the police, made punching motions with it, and advanced toward the officers, who had difficulty retreating due to the close quarters of the mobile-home park in which the incident took place *Id.* at 624–25. This is a far cry from holding a kitchen knife in one's yard.

In *Thomson v. Salt Lake County*, 584 F.3d 1304 (10th Cir. 2009), cited in Pet. 16, the plaintiff was armed with a gun, not a knife, and he had previously moved the firearm up and down and aimed it at the officers. *Id.* at 1318. Unlike Ms. Hughes, he therefore posed "an immediate threat to [the officers] or to others in the neighborhood." *Id.*

In *Long v. Slaton*, 508 F.3d 576, 578–79 (11th Cir. 2007), *cited in* Pet. 16, a police officer tried to arrest a man who responded by *stealing the officer's police cruiser* and driving off. The court found the use of force reasonable based on the unique dangers posed by an erratic person in control of a police car: "We stress these facts: Long was mentally unstable; and he had taken control of not just any vehicle, but a *police* cruiser. . . . Different from other vehicles, this fully marked and fully equipped police cruiser had an even greater potential for causing—either intentionally or otherwise—death or serious bodily injury." *Id.* at 581.

There is no circuit split here. The court of appeals, like every other circuit, considered third-party harm. Viewing the facts in the light most favorable to

Hughes, the court of appeals concluded, correctly, that the circumstances of the shooting did not reveal an appreciable risk of harm to Chadwick. To manufacture daylight between the decisions below and the cases discussed above, the petition resolves disputed facts against Hughes, assuming, for example, that Kisela thought she was raising the knife at Chadwick when he opened fire. Pet. 19.

C. There is No Conflict Between the Decision Below and the Prior Decisions of the Ninth Circuit and this Court.

Petitioner's efforts to invent a conflict between the prior decisions of the Ninth Circuit and this Court follow the same faulty logic as his attempt to conjure a circuit split. Petitioner imagines a serious threat to Ms. Chadwick by refusing to consider the facts in the light most favorable to Ms. Hughes. Because the facts viewed in the light most favorable to Ms. Hughes present no such risk, the tension petitioner imagines between the decision below and holdings of this Court and the Ninth Circuit does not exist.

The Ninth Circuit's decision in *Blanford* has been discussed above. *See supra* § I.C. This Court's decision in *Scott v. Harris*, 550 U. S. 372 (2007), *cited in* Pet. 15, is also far off the mark. In *Scott*, the plaintiff led police on a car chase at speeds topping 85 miles an hour, evaded pursuit by driving into and colliding with a police cruiser, and kept going. *Id.* at 374–75. This Court held that it was reasonable for a police officer to bump the fugitive's vehicle from behind so as to disable it. *Id.* at 384. The Court summarized a videotape of the chase as follows:

> There we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up . . . [W]hat we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.

Id. at 379–80.

There is no meaningful comparison between an officer bumping a suspect's car from behind after the suspect led police on a Hollywood-style chase, and shooting a woman who is holding a kitchen knife while conversing in her own yard.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 E. Chicago Ave.
Chicago, IL 60611
312.503.0711
david.shapiro@law.northwestern.edu

VINCENT LEE RABAGO
VINCE RABAGO LAW OFFICE, PLC
2135 E. Grant Road
Tucson, AZ 85719
520-955-9038

AMIR H. ALI
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

Attorneys for Respondent

DECEMBER 4, 2017